IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.475 OF 2005
WITH
CIVIL APPLICATION NO.804 OF 2005
IN
SECOND APPEAL NO.475 OF 2005

Nana Dharma Patil .. Appellant.
Vs.
Parshuram Goma Phadke & Ors. .. Respondents.

Mr.G.V.Limaye for the appellant/applicant.
Mr.Kiran Kandpile for respondent nos.1 to 9.

CORAM : D.B.BHOSALE, JJ.
DATED : 31ST JULY, 2007.

P.C.:

. Heard learned counsel for the parties.

2. This second appeal is directed against the concurrent findings of fact recorded by the courts below by which a suit for possession filed by respondent-plaintiff has been decreed. It appears that prior to filing of the present suit the respondent-plaintiff had filed regular civil suit no.73/1998 for enforcement of usufructuary mortgage. The said suit was decreed. The appeal, carried by the appellant-defendant, was allowed by the District Court. The second appeal filed against the order of the first appellate Court by the respondent-plaintiff was also dismissed. It appears the learned Single Judge, who had dismissed the second appeal no.521 of

1981 vide order dated 11th July, 1997 had observed that the transaction between the parties in 1969 was usufructuary mortgage and since the document was not registered the respondent-plaintiff was not entitled to sue for redemption of such mortgage. Admittedly, in the earlier suit the possession was not sought on the ground that the appellant-defendant was trespasser in the said suit land. In these circumstances after disposal of the suit by this court in the second appeal vide order dated 11.7.1997 the present suit was filed for possession. It is against this backdrop Mr.Limaye, learned counsel for the appellant raised only one contention that the defendant was put in possession in 1969 and since then he started asserting his possession over the suit property as owner and, therefore, he has become owner of the suit land by adverse possession. Such contention was raised before the first appellate court. The court below has answered the issue in negative holding that the period between filing of regular civil suit no.58/1998 till the disposal of the second appeal on 11.7.1997 required to be excluded and if this period is excluded, the plea of adverse possession is not sustainable in law. The suit was, accordingly, decreed holding that the appellant cannot claim ownership by adverse possession. Mr.Limaye, learned counsel for the

appellant placed heavy reliance upon the judgment of the Supreme Court in **Gurdit Singh and Others V. Munsha Singh and Others AIR 1977 Supreme Court 640** to contend that it cannot be said that the respondent-plaintiff was prosecuting earlier suit with due diligence. He submitted that after the first appeal was allowed by the District Court at that stage itself the respondent-plaintiff should have filed the present suit. He submitted that looking to the conduct of the appellant it cannot be said that he prosecuted the earlier civil suit with due deligence. I perused the order passed in the second appeal so also the judgment of the District Court in the first appeal. It will not be possible to accept the submission of the learned counsel for the appellant that the respondent-plaintiff was not deligent enough in filing the earlier suit and prosecuting it good faith in the court which had no jurisdiction to entertain it. The judgment relied upon by learned counsel for the appellant in view of the peculiar facts and circumstances of the case is of no avail to the appellant. Looking to the overall facts and circumstances of the case and the manner in which the plaintiff was prosecuting the earlier suit, it cannot be said that he was not doing so in good faith and did not show due diligence. The findings recorded by the courts below are based on

the evidence on record. I find not reason to interfere with the concurrent findings of facts. No substantial question of law is raised in this appeal. The second appeal, accordingly, stands dismissed. Consequently, the civil application is also disposed of. All concerned to act on an authenticated copy of this order duly issued by the Registry.

(D.B.BHOSALE, J.)